



17 S. High Street – Suite 200  
Columbus, OH 43215  
Tel: 614/221-1900; Fax: 614/221-1989  
Email: [oacta@assnoffices.com](mailto:oacta@assnoffices.com)  
[www.oacta.org](http://www.oacta.org)

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## INSURANCE COVERAGE NEWSLETTER



### NANOTECHNOLOGY: SWEATING THE SMALL STUFF OR A FUTURE LEGAL TSUNAMI?

By John G. Farnan

Lately, in the insurance coverage world in the legal field, there is a growing buzz about nanotechnology. The plaintiffs' bar is always looking for the next asbestos or other type of claim that will enable them to strike at manufacturers, employers and their insurers. Insurers and manufacturers and employers with foresight, should be looking down the road to try and limit their exposure and liability, and potential harm to workers and users of their products. No one knows for sure whether the threat of future nanotechnology claims will be a bust, like the threat of "Y2K" remediation claims or whether it will turn into a health and physical nightmare for workers and product users and a fiscal nightmare for employers, manufacturers and insurers. Thus, in this world of rapidly changing technologies, thoughtful employers, manufacturers and insurers should at least be aware of the threat of nanotechnology claims and study if and how they should be avoiding or minimizing same.

#### 1. What Is Nanotechnology?

Before doing so, it would be helpful to know a little about nanotechnology. What is it? Nanotechnology is the control and use of matter at dimensions between approximately one and 100 nanometers. A nanometer is one-billionth of a meter. For example, a sheet of paper is about 100,000 nanometers thick. Indeed, the prefix "nano" means "one billionth". Nano particles, nanotubes and nano films are different types of nano materials, named for their individual shapes and dimensions.

Nanotubes are seamless cylinders of hexagonal carbon networks and are ten thousand times thinner than a human hair while hundred times stronger and six times lighter than steel. They are used in adhesives, coatings and polymers, and have electrically conductive filters and plastics that make polymers more resistant against temperatures, harsh chemicals, corrosive environments, extreme pressures and abrasions.

Currently, nanotechnology is used in many commercial products and processes. For example, nano materials are used to add strength to composite materials used to make lightweight tennis rackets, baseball bats and bicycles. Opticians use nano coatings on eyeglasses to make them easier to clean and harder to scratch. Nano ceramics are used in some dental implants. Generally speaking, manufactured products are made from atoms and the properties of those products depend on how the manufacturer arranges those atoms. Manufacturing methods are currently considered to be very crude at the molecular level. Nanotechnology is currently used in over 200 consumer products including sunglasses, sunscreens, cosmetics, textiles and t.v.'s.

Nanotechnology has the potential to create many new materials with a vast range of applications in medicine, electronics, pharmaceuticals, biomaterials and energy production. When brought into a bulk material, nano particulars can influence the mechanical properties of materials like their stiffness or elasticity and have been a boon in the medical field by delivering drugs to specific cells using nano particles. For instance, it is reported that nanotech-enabled sensors could possibly be able to “smell” cancer and gold nano particles are reportedly being developed to detect early stage Alzheimer's Disease. Nanotechnology can also reportedly help reproduce or repair damaged human tissue.

## **2. What Are The Concerns?**

With all these potentially positive applications, what are the concerns? Some press reports have called nanotechnology and nano particles the “asbestos of the future” since, like asbestos, nano particles can infiltrate lung cells and can enter human cells. Researchers injecting nanotubes into the abdomens of mice have induced lesions similar to those that appear on the outer lining of the lungs after the inhalation of asbestos.

Since nano particles can penetrate the skin, there are concerns about whether the use of nano particles in cosmetics creates a risk to the cosmetics user. Nano materials are able to cross biological membranes and access cells, tissues and organs that larger size particles cannot. Nano materials can gain access to the blood stream via inhalation or ingestion or through the skin. Once in the blood stream, nano materials can be transported around the body and infiltrate organs and tissues, including the brain, heart, liver and kidneys. A March, 2004 study, conducted by an environmental toxicologist, found extensive brain damage to fish exposed to nano particles for a period of just 48 hours.<sup>1</sup>

There have been reports of industrial workers in China developing shortness of breath, pleural effusion and pericardial effusion as a result of exposure to nano particles, two

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<sup>1</sup> *Oberdorster, Gunter* (July, 2005). "Nanotoxicology: An Emerging Discipline Evolving From Studies of Ultrafine Particles" *environmental health perspectives* 113(7): 823-39.

of whom reportedly died as a result of ensuing respiratory failure.<sup>2</sup> German regulators reported 77 cases of severe respiratory complaints in a period of one week arising from the use of a cleansing product known as “Magic Nano”.<sup>3</sup>

### 3. Coverage Opportunity Or Coverage Exclusion?

Putting aside the human costs, to injured workers and users of nanotechnologies, if indeed they prove to have deleterious physical side effects, nanotechnology could be a tremendous boon to the plaintiff’s bar if nanotechnology turns out to be another asbestos. The defense bar would also “win” by having a whole host of new claims to defend. Insurers are already concerned. Some apparently view it as a business opportunity and are developing and selling coverage for nanotechnology risks. Others are already drafting and employing nanotechnology exclusions to curtail or eliminate the exposure to such risks.

For example, Lexington Insurance Company, a Chartis company (the former AIG), announced in 2010 that it was introducing a “Lex Nano Shield<sup>SM</sup>”, which it described as “an integrated insurance product and array of risk management services designed for firms whose principle business is manufacturing nano particles or nano materials, or using them in their processes.” The Lexington nanotechnology coverage includes general liability, product liability, product pollution legal liability, and product recall liability exposure coverage. Additionally, Lexington’s policy provides first party coverage if a product containing nano particles or nano materials is recalled from the market for safety reasons.

Other insurers are moving to limit or exclude nanotechnology risks. For example, in 2008, Continental Western Insurance Company issued a nano-specific commercial insurance exclusion. Continental’s “background on nanotubes” document reportedly stated this policy behind its exclusion:

“The intent of this exclusion is to remove coverage for the, as of yet, unknown and unknowable risks created by products and processes that involve nanotubes. The exclusion is being added to make you and your customers explicitly aware of our intent not to cover injury and/or damage arising from nanotubes, as used in products and processes. \* \* \*”<sup>4</sup>

The Continental exclusion, which went into effect on November 15, 2008, modified commercial general liability, business owners, business auto, garage and motor carrier coverage to preclude liabilities related to nanotechnology and nanotubes.

The Insurance Services Office (“ISO”) has already created a “nanotubes and nano technology exclusion” endorsement. Form CW 33 69 06 08. That exclusion precludes coverage for claims arising out of nanotechnology:

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<sup>2</sup> Song, Y., LiX., DuX, Exposure to Nano particles is related to pleural effusion, pulmonary fibrosis and granuloma, Eur. Respir. J. 2009 Sep.: 34-559-67.

<sup>3</sup> Nanotechnology cleanser recalled for chest pains, hospitalizations, 15 Mealey’s emerg. toxic torts 21 (April 7, 2006).

<sup>4</sup> Nanotechnology Law Report (September 24, 2008), [www.nanolawreport.com](http://www.nanolawreport.com).

“This insurance does not apply to:

1. “Bodily injury”, “property damage” or “personal and advertising injury” related to the actual, alleged or threatened presence of or exposure to “nanotubes” or “nanotechnology” in any form, or to harmful substances emanating from “nanotubes” or “nanotechnology”. This includes the use of, consumption of, ingestion of, inhalation of, absorption of, contact with, existence of, presence of, proliferation of, discharge of, dispersal of, seepage of, migration of, release of, escape of, or exposure to “nanotubes” or “nanotechnology”. Such injury from or exposure to “nanotubes” or “nanotechnology” also includes, but is not limited to:
  - a. The existence, storage, handling or transportation of “nanotubes” or “nanotechnology”;  

\* \* \*
  - d. Any structures, manufacturing processes or products containing “nanotubes” or “nanotechnology”;  

\* \* \*
  - f. Any product manufactured, sold, handled or distributed by or on behalf of the insured which contains “nanotubes” or “nanotechnology”; \* \* \*.”

### Conclusion

Lloyd’s of London released a report on nanotechnology risks and opportunities in January of 2008, estimating that 15% of all products will contain nanotechnology by the year 2014. At this juncture, it remains to be seen whether this exciting new technology, which may change the way we live and have tremendous health benefits, will also have a downside for consumers, property owners and workers - said downside which could also be a boon to the plaintiff’s bar and defense bar, while creating tremendous challenges for insurers.

However, one thing is certain: this issue will not go away and can only be ignored at its peril. Smart businesses, including manufacturers, employers **and law firms and insurers**, should be studying this issue and be prepared to deal with it.



**EVIDENCE OF WRITE-OFFS IS ADMISSIBLE TO SHOW  
THE REASONABLE VALUE OF MEDICAL EXPENSES --  
OHIO SUPREME COURT DECIDES *JAQUES V.*  
*MANTON***

**By Dan Richards**

The Ohio Supreme Court announced its much anticipated decision in *Jaques v. Manton* on May 4, 2010. The Court's decision holds that evidence of write-offs is admissible to show the reasonable value of medical expenses. The Ohio Supreme Court rendered a similar decision in 2006 in the case of *Robinson v. Bates*, 112 Ohio St.3d 117. The *Robinson* decision addressed the admissibility of write-offs under the common-law collateral-source rule. The Court in *Robinson* held that the collateral-source rule does not apply to preclude evidence of write-offs of medical services. The Court observed that "[b]ecause no one pays the write-off, it cannot possibly constitute payment of any benefit from a collateral source."

The Ohio General Assembly enacted R.C. 2315.20 after the cause of action accrued in the *Robinson* case. As such, the Ohio Supreme Court did not construe R.C. 2315.20 in *Robinson*. That statute deals with the introduction of evidence of collateral benefits in tort actions. It provides that defendants in tort actions "may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the damages that result from an injury . . . that is the subject of the claim upon which the action is based, except if the source of collateral benefits has . . . a contractual right of subrogation." A split of authority developed in Ohio regarding whether R.C. 2315.20 precludes evidence of write-offs. Some courts have held that *Robinson* applies despite the language of R.C. 2315.20 and others, including the appellate court in *Jaques*, have held that the statute precludes the introduction of evidence of write-offs.

In a 5 to 1 decision authored by Justice O'Donnell, the Ohio Supreme Court clarified that its prior decision in *Robinson* controls and that R.C. 2315.20 does not apply to preclude evidence of write-offs. The Supreme Court recognized that R.C. 2315.20 pertains only to "evidence of any amount payable as a benefit to the plaintiff." Since a write-off does not constitute a benefit paid by a collateral source, R.C. 2315.20 does not preclude evidence of the write-off.

This well reasoned decision puts to rest an issue present in the vast majority of Ohio personal injury lawsuits.

## CASE SUMMARIES

### ***Expert Testimony Not Always Required to Establish Insurance Agent Malpractice***

*American International Recovery v. Allstate Ins. Co.*, 2009-Ohio-6508, was a subrogation case where the court was faced with the issue of whether expert testimony was required to establish a breach of the duty of care by an insurance agent. Formoso owned a vehicle that was involved in an accident. Several days before the accident, Formosa called his agent to request that coverage on the vehicle be cancelled effective the following weekend. Notwithstanding Formoso's specific instruction as to the date of the cancellation, coverage on the vehicle was cancelled on the date that Formoso called the agent. Accordingly, there was no coverage in effect on the date of the accident. In its subrogation suit, AIR argued that the agent had an obligation to inform his customer that coverage had been cancelled immediately, but did not call an expert or offer any testimony on

the duty of care owned by the agent. The trial court granted Allstate's motion for a directed verdict on the basis that, in the absence of expert testimony establishing the appropriate duty of care, the Plaintiff could not establish "insurance agent malpractice." The Court of Appeals reversed, holding that, while expert testimony to establish a breach of the duty of care of an insurance agent is required in some cases, it was not required in this case. In the instant case, the court held that "the duty of the insurance agent [to inform the insured that he no longer had coverage as of the date of his phone call] was so apparent as to be within the comprehension of laymen and required only common knowledge and experience to understand and judge it..."

### ***An Order Declaring an Insured in Entitled to Coverage, but not Addressing Damages, Is Not a Final Appealable Order***

In *Van's Camera v. Hanover Ins. Co.*, 2009-

Ohio-6333 (Fifth Appellate District), the Court of Appeals declined to address the merits of the underlying case on the basis that the order granting summary judgment in favor of the plaintiff-appellant was not a final appealable order despite the requisite Civ. R. 54(B) language being used in the judgment entry. This decision was made pursuant to the authority of the Ohio Supreme Court's decision in *Walburn v. Dunlap*, 121 Ohio St.3d 373, 2009-Ohio-1221, where the Ohio Supreme Court previously held that although an action seeking a declaration of the parties' rights and responsibilities as they pertain to insurance coverage is a special proceeding under R.C. 2505.02, an order declaring an insured is entitled to coverage, but not addressing damages, does not affect a "substantial right," and therefore, is not a final appealable order despite the requisite Civ. R. 54(B) language (that there was no just cause for delay) being used.

Appeal was dismissed for lack of jurisdiction.

***Children's Intent to Commit Prank Cannot Necessarily Be Inferred as Intentional Conduct So as to Trigger Policy Exclusion for Intentional Acts***

At issue in *Allstate Ins. Co. v. Campbell*, 2009-Ohio-6055 (Tenth Appellate District), was the inferred intent doctrine and whether intent could be inferred as a matter of law to preclude coverage for intentional acts that “are not as certain to cause injury as the acts underlying murder and sexual molestation,” to which inquiry the Court of Appeals answered no. Specifically, at issue was whether the injuries resulted from an “accident” and whether the intentional acts exclusions of the various insurance policies barred coverage. There was no dispute the boys’ conduct was intentional. The dispute instead was whether they also intended harm or injury to follow from their intentional act. To understand the holding of this case, the facts must be briefly examined. The insureds’ sons, as a high school prank, placed

a painted Styrofoam decoy deer in the middle of a rural two-lane highway at night just beyond the crest of a hill. The posted speed limit on the roadway was 55 mph. The high schoolers admitted they knew the posted speed limit was 55 mph but several of the high schoolers denied they worried about or even contemplated that an injury could result from their actions.

In overruling the trial court’s decision granting summary judgment in favor of the various insurers, the Court of Appeals likened this case to the Minnesota federal court case of *Tower Ins. Co. v. Judge* (U.S. Dist. Minn. 1993), 840 F. Supp. 679 where five 19 years olds accidentally electrocuted their friend to death by trying to “shock” him awake, and held that even though the kids’ assessment of potential danger in this case ultimately proved to be incorrect, “their misjudgment was not enough to bring them within the intentional acts exclusions in the policies as a matter of law.” The Court of Appeals further held there existed genuine issues of material fact as to whether the accident resulted not only from

the kids’ conduct, but also from the conduct of the vehicle’s driver. In particular, the kids had testified that the vehicle was being driven at a high rate of speed, with some estimating the speed to be as high as 80 mph. The Court of Appeals opined that “[b]ecause questions of fact remain as to the certainty of harm from the boys’ actions, we reverse the trial court’s conclusion that intent may be inferred as a matter of law under these circumstances.” The insurers have appealed the decision. On March 10, 2010, the appeal was accepted for review.

***Policy Exclusion for Criminal Acts held not to Bar Coverage for Property Damage Caused by Illegal Fireworks***

In *Nationwide Mutual Ins. Co. v. Briggs*, 2009-Ohio-6452 (Fifth District), the Court of Appeals affirmed a declaratory judgment entered in favor of Cory Briggs, concluding that Briggs was entitled to insurance coverage for fire damage caused by a stray bottle rocket that Briggs had lit.

Briggs set off the bottle rocket in the middle of a field at a middle school in Massillon, Ohio, intending for it to go straight up into the air. The rocket made a ninety-degree turn, however, and landed in a nearby garage, starting a fire that could not be extinguished. Briggs pled no contest to, and eventually was found guilty of, charges of possession of fireworks and discharge of fireworks in violation of Massillon city ordinances. Nationwide, which had issued his parents' homeowners' policy, then filed this declaratory judgment action to preclude coverage on the basis of an exclusion for injury or property damage "caused by or resulting from an act or omission which is criminal in nature and committed by an insured." *Id.* at ¶ 12.

With little analysis, the Court of Appeals affirmed the trial court's ruling that this exclusionary language was "overly broad as applied to [Briggs] [because it] does not distinguish between damages or injuries intended or reasonably expected to result and those damages or injuries

where are accidental or result from mere negligent conduct."

***Policy Term Requiring Suit for UIM Benefits Within Three Years was not Ambiguous in View of Exhaustion and Legal Action Provisions***

In *Chalker v. Steiner*, 2009-Ohio-6533 (Seventh District), the Court of Appeals affirmed summary judgment entered in favor of Grange Mutual Insurance on Ronnie Chalker's claim for under-insured motorist benefits under his policy.

In May 2003, Chalker suffered injuries in a car accident caused by Darlene Steiner, who had a \$25,000 insurance policy. Three years and four months later, Steiner admitted liability and offered to settle his lawsuit for her policy limits. Because this amount was insufficient to cover his injuries, he notified Grange and sought UIM coverage under his policy. Chalker's policy contained three clauses: (1) an exhaustion clause that required him to notify Grange of any settlement offer and

obtain either permission to settle or an advancement of funds; (2) a "legal action" provision that barred him from suing Grange for UIM benefits "until there has been full compliance with all terms of this policy"; and (3) a limitations clause that required him to file suit for UIM benefits within three years of the accident. When notified of Steiner's settlement offer, Grange advised Chalker that he could no longer sue for UIM benefits because the accident occurred more than three years earlier. Chalker nevertheless amended his complaint to include a claim for UIM benefits under his policy, and Grange moved for summary judgment.

According to Chalker, the three-year limitations clause was ambiguous, and therefore unenforceable, when viewed in light of the other two terms. Specifically, he asserted that the legal action term precluded him from suing Grange until he had complied with the notice and exhaustion terms, and because Steiner did not offer to settle until more than three years after the accident, he could not

have filed a timely suit for UIM benefits. Essentially, he argued that giving notice of the settlement offer was a condition precedent to his filing suit for UIM benefits. The trial court rejected this argument, however, and granted summary judgment in favor of Grange.

On Chalker's appeal, the Seventh District affirmed, holding that the exhaustion requirement is a condition precedent to *Grange's duty to pay* UIM benefits, not to his filing suit for UIM benefits. The Court of Appeals noted that this holding is in accord with a series of Ohio Supreme Court decisions, including *Angel v. Reed*, 119 Ohio St.3d 73 (2008), where the court held that an insured does not need to wait for a settlement offer to file suit for UM coverage. Similarly, the Seventh District noted that its decision in this case is consistent with those from several other Ohio appellate districts.

***Court Finds Coverage Issue Moot in Intentional Tort Case***

In *Jefferson v. Benjamin Steel*, 2010-Ohio-50 (Fifth Appellate District), the trial court held an

employer was not liable for intentional tort under the common law or new statute, which it found constitutional. The Court of Appeals did not decide the constitutionality issue finding that even if the statute was unconstitutional, plaintiffs could not prove an intentional tort claim under the common law. Cincinnati Insurance Company had intervened seeking a declaration that there was no coverage on plaintiffs' statutory claims because the statute requires truly intentional conduct. The trial court found Cincinnati's coverage claims moot due to the finding of no liability on the insured. Cincinnati filed a cross-appeal arguing the trial court should have ruled on the merits of its coverage claim. The Court of Appeals held that Cincinnati's cross-appeal was moot for the same reasons found by the trial court.

***Court Finds Additional Insured Endorsement Covered Only Vicarious Liability***

In *Currier v. Penn-Ohio Logistics*, 2010-Ohio-198, decedent died at work when the floor upon which he was working

collapsed. His estate filed a wrongful death case based on negligence against the landlord of the building and intentional tort against decedent's employer. Erie Insurance Company, the employer's insurer, intervened to argue that the landlord's status as an additional insured only covered it for vicarious liability and not independent acts of negligence. The trial court ruled in favor of Erie on this issue. The trial court also held the lessor was out of possession and did not owe a duty to decedent. The Court of Appeals affirmed summary judgment for the landlord finding it was out of possession. The additional insured endorsement stated that the landlord was insured "but only with respect to liability arising out of [the tenant's] operations or premises rented to [the tenant]". The Court of Appeals held the phrase "arising out of" meant that coverage was limited to vicarious liability. The court also stated that to find otherwise, the endorsement would have to say that coverage existed for the landlord's independent acts of negligence on the tenant's premises. The court held that the trial

court did not err in refusing to consider testimony from the tenant's insurance agent because the terms of the policy were clear and outside evidence was inadmissible. Even so, the agent's testimony actually supported the court's construction of the additional insured endorsement.

### ***Court Rules for Insurer on "Newly Acquired Auto" Issue***

In *Selective Insurance Company v. Arrowood Indemnity Co.*, 2010-Ohio-557, a young new automobile purchaser rear-ended another vehicle while driving to an insurance agent's office to purchase coverage for the new vehicle. The injured party sued the driver and her father claiming that he negligently entrusted the vehicle to her and she sued her own carrier for uninsured motorist benefits. The UM carrier, Selective, paid the injured party \$246,000 and then sued the daughter and her father for reimbursement. Arrowood Insurance Company, the father's insurer, denied coverage. The trial court found coverage on the grounds that the new vehicle was

a "newly acquired auto." The Arrowood policy excluded coverage for vehicles owned by other family members. Selective argued that the girl's mother should have been considered an "owner" of the vehicle because she cosigned the purchase agreement. The trial court accepted this argument, but the Court of Appeals did not. The Court of Appeals found that the daughter was the sole "owner" because the vehicle was titled in her name, she was the intended user, and was the only person to make payments on the loan. Although the mother may have had an insurable interest in the vehicle because she was jointly liable for the loan payments, this did not make her an "owner." Since the mother did not "own" the vehicle, it was not, by definition, a "newly acquired auto."

### ***Court Dismisses Appeal in Construction Case for Lack of Final Order***

In *Fertec v. BBC&M Engineering*, 2009-Ohio-5246, plaintiff contracted with defendant for engineering services for a new home. The residence experienced excessive foundation

settlement resulting in \$530,000 in damages. The trial court ruled that based on a contractual limitation of liability, plaintiff's recovery was limited to \$6,427.80. The trial court certified its ruling as final and plaintiff appealed. The Court of Appeals dismissed the case on the grounds that the trial court's ruling was not final. Although the trial court emasculated plaintiff's case by dramatically limiting damages, it did not decide whether plaintiff was, in fact, entitled to those damages. The trial court's ruling therefore did not dispose of all issues and could not be appealed.

### ***Court Rules for Allstate in Permissive Use Case***

In *Milburn v. Allstate*, 2009-Ohio-5476, plaintiff's daughter died while riding as a passenger in a vehicle her grandfather owned and that he had lent to her for full-time use. The daughter was driving, but she allowed her 14-year-old boyfriend to take the wheel. He lost control and struck two trees. The daughter lived in the same home with her parents and grandparents. The vehicle was listed as

a covered vehicle under the parents' policy with Allstate. The grandfather had his own policy with Allstate but the vehicle was not listed. The boyfriend's mother had liability coverage through Farmers and it paid its \$30,000 limits. Allstate denied liability coverage under both the parents' and grandfather's policy. The Court of Appeals reversed the trial court's finding that the "intra-family exclusion" applied to defeat liability coverage. However, the Court of Appeals held the boyfriend was not an "insured person" entitled to liability coverage. The court based its decision on the fact that the parents did not give the boyfriend permission to drive the car. The Court of Appeals also held Allstate did not owe UM coverage because the auto was listed under the parents' policy and therefore did not qualify as an uninsured auto. Finally, the Court of Appeals held there was no UM coverage under the grandfather's policy because the vehicle was not listed under his policy but was listed under the parents' policy.

***Court Overlooks  
Communication  
Problems in***

***Application for  
Insurance***

In *Stallings v. Safe Auto*, 2010-Ohio-677, the Court of Appeals affirmed summary judgment for Safe Auto because plaintiff's son, who was injured, was clearly an excluded person under the policy. That case is noteworthy because plaintiff was hearing impaired and her recorded conversations with State Auto when she applied for coverage were arguably unclear. The dissenting judge found a lack of communication, which raised a genuine issue of material fact as to whether "Safe Auto exercised good faith and reasonable diligence in procuring" the mother's insurance policy.

***Court Rules for Insurer  
in Rejection of  
UM/UM Coverage  
Case***

*Bossin v. Groves*, 2010-Ohio-664, harkens back to the days of *Linke*. The Court of Appeals reversed the trial court's decision finding coverage under a UM/UM policy. Plaintiff was an employee of the insured, Viacom. Viacom signed a rejection of UM/UM coverage, but the rejection form did not state the

premium for the coverage. Travelers introduced extrinsic evidence that Viacom was aware of the premium. The Court of Appeals held that under the applicable version of R.C. 3937.18, the rejection was valid even without written disclosure of the premium based on the extrinsic evidence.

***Court Rules Against  
Insurer's Right to  
Reimbursement Based  
on Procedural Issue***

In *Whitaker v. Jones*, 2010-Ohio-668, the Court of Appeals reversed the trial court on a reimbursement issue. Plaintiff's car accident victims sued the tortfeasor and their own UM/UM carrier, Allstate. Allstate filed a subrogation cross-claim against the tortfeasor, but not a counterclaim against plaintiffs. The jury returned verdicts for the plaintiffs and the trial court ordered plaintiffs to reimburse Allstate for medical bills it paid plaintiffs' chiropractor. The Court of Appeals stated that the trial court acted in an equitable manner, but that plaintiffs were not legally required to reimburse Allstate because it failed

to make a claim against them.

***Supreme Court  
Prohibits Double  
Recovery for Med Pay  
Benefits***

*State Farm v. Grace*, 123 Ohio St.3d 471, 2009-Ohio-5934, is a departure from prior law. The Ohio Supreme Court held that policy language precluding payment of medical bills under UIM/UIM coverage that have already been paid under the Medical Payments coverage is enforceable. The court relied on the clear language of R.C. 3937.18, effective October 31, 2001. Since at least 1978, the law had been that such language was unenforceable.

***Declaratory Judgment  
in Favor of Insurer that  
Does Not Deny the  
Insured a Defense is  
Not Appealable***

In *Kallaus v. Allen*, 2009-Ohio-6339 (Fifth Appellate District), the Court of Appeals dismissed appeals filed by Gerald and Anne Kallaus, Danny Allen, and Danny Allen Well Drilling, Inc. (the Allen Defendants), from an entry of summary

judgment in favor of Westfield Ins. Co., which had denied any obligation to indemnify or defend the Allen Defendants under a commercial general liability policy (CGL).

Kallaus filed this action against the Allen Defendants after he crashed his motorcycle into the back of Allen's truck, which was backing out of a driveway onto the road. Westfield, which insured the Allen Defendants under automobile and CGL policies, sought a declaration that the Allen Defendants are not entitled to a defense or indemnification under the CGL policy. The trial court agreed with Westfield, granted its motion for summary judgment, and certified that there was no just reason for delaying an appeal despite the claims still pending between Kallaus and the Allen Defendants. Both Kallaus and the Allen Defendants appealed to the Fifth District.

Although the parties did not specifically raise the issue, the appellate court noted that it only has jurisdiction to consider appeals from decisions that qualify as "final, appealable

orders." The Fifth District followed the Ohio Supreme Court's recent decision in *Walburn v. Dunlap* (2009), 121 Ohio St.3d 373, which held that while a declaration that affects the insurer's duty to defend is a final appealable order, a declaration that affects only the insurer's obligation to indemnify is not a final appealable order until there is a final judgment in the underlying personal injury action. Applying *Walburn* here, the Court of Appeals observed that the judgment on appeal ultimately did not actually affect the defense of the Allen Defendants because Westfield was honoring its duty to defend those defendants under their automobile policy, even though it was also denying its obligation to defend them under the CGL policy. Thus, the trial court's judgment was not a final appealable order, and the Court of Appeals dismissed the appeals filed by Kallaus and the Allen Defendants for lack of jurisdiction.

***Charter Bus and  
Driver Not "Hired" by  
Insured that Did Not  
Have "Predominate***

***Authority" and  
"Control" Over the Bus  
and Driver***

In *Federal Ins. Co. v. Executive Coach Luxury Travel*, 2009-Ohio-5910 (Third Appellate District), the Court of Appeals found that the trial court properly granted summary judgment in favor of the insurers finding that a charter bus company and its driver were not insureds for purposes of an underlying insurance policy that would trigger the insurers' umbrella and excess policies.

The suit arose when a charter bus belonging to Executive Coach and carrying the Bluffton University baseball team was involved in a crash in Atlanta, Georgia. Five baseball players, bus driver Jerome Niemeyer, and Niemeyer's wife were killed in the crash. Many other occupants were injured.

The insurers filed complaints for declaratory judgment against Executive Coach and Niemeyer, arguing that Executive Coach and Niemeyer did not qualify as "insureds" under the underlying policy that contained the following language: *The following are*

*"insureds": a. You for any covered "auto"; b. Anyone else while using with your permission a covered "auto" you own, hire or borrow...*

The insurers filed for summary judgment, which the trial court granted, finding that Niemeyer's employment and use of the bus was within Executive Coach's and not Bluffton University's permission. The trial court also found that Executive Coach at all times maintained "possession and control" of the bus. Additionally, Bluffton University had no authority to terminate Niemeyer's use of the bus. The Appellate Court agreed.

In affirming the trial court's decision, the Appellate Court also found that the trial court did not abuse its discretion in quashing an intervening party's subpoena of the underlying insurer's underwriting file and its claims as the intervenor had failed to demonstrate that the files were relevant to the issues in the coverage action.

***Insured's Conviction  
Based on No-Contest  
Plea is Not Admissible  
in Declaratory Action  
to Deny Coverage***

***Based on "Dishonest or  
Criminal Acts"  
Exclusion***

In *Elevators Mut. Ins. Co. v. J. Patrick O'Flaherty's Inc.*, 2010-Ohio-1043, the Ohio Supreme Court affirmed the Appellate Court's reversal of summary judgment for the insurer finding that Richard Heyman's convictions for arson and insurance fraud based on a no-contest plea were inadmissible for purposes of denying coverage based on a "dishonest or criminal acts" policy exclusion.

The suit arose when Heyman set fire to J. Patrick O'Flaherty's, a restaurant he operated with his wife. O'Flaherty's was the sole named insured on a policy of insurance issued by Elevators Mutual. Elevators Mutual initially advanced \$30,000 on the claim subject to a reservation of rights pending a complete fire examination. After determining the fire was intentionally set by Heyman, Elevators Mutual filed a declaratory action against O'Flaherty's and Heyman and his wife. Shortly thereafter, Heyman and his wife were indicted on

charges of aggravated arson, arson, and insurance fraud in relation to the fire. Heyman pleaded no contest to the charges of arson and insurance fraud and was convicted. The charges against his wife were dismissed.

Initially, the trial court denied Elevator Mutual's motion for summary judgment, concluding that evidence of Heyman's no contest plea was not admissible pursuant to Evid. R. 410. Thus, an issue of fact remained over Heyman's responsibility for the restaurant fire.

However, after Elevators Mutual filed a motion in limine for an order permitting it to introduce Heyman's criminal convictions, rather than pleas, as substantive evidence of arson and insurance fraud. The trial court granted this motion and also reconsidered and granted Elevators Mutual's summary judgment motion.

The Court of Appeals reversed and remanded, rejecting any distinction between a no contest plea and a conviction based upon that plea, and finding that the convictions were not

admissible pursuant to Evid. R. 410 and Crim R. 11(B)(2). The Supreme Court agreed and also stated that an exception available under *State v. Mapes*, 19 Ohio St.3d 108, was limited to cases where the fact of the conviction is made relevant by a statute or rule and is not applicable to contract situations.

***Business Exclusion  
Applies to Bar  
Coverage Under  
Personal Umbrella  
Liability Policy  
Because Charter Bus  
was not an "Auto" and  
was being Operated as  
a "Livery Conveyance"***

In *Niemeyer v. Western Reserve Mut. Cas. Co.*, 3d Dist. No. 12-09-03, 2010-Ohio-1710 (Third District), the Court of Appeals affirmed the trial court's decision to grant summary judgment in favor of Western Reserve Mutual Casualty Company ("Western Reserve") on the questions of coverage provided by an insurance policy issued by Western Reserve.

The suit arose when a charter bus hired by Bluffton University, operated by Executive Coach Luxury Travel, Inc. ("Executive

Coach"), and driven by Executive Coach employee Jerome Niemeyer crashed. The crash killed five members of the Bluffton University baseball team, Niemeyer and his wife, Jean. Many of the other occupants were injured, and numerous lawsuits have been filed.

The plaintiff, David L. Niemeyer, Executor of the Estate of Jean Niemeyer, filed a complaint seeking a judgment declaring that insurance coverage existed under two insurance policies purchased by the Niemeyers. One policy was a personal automobile policy issued by Lightning Rod Mutual Insurance Company ("Lightning Rod"), and the other policy was a personal umbrella liability policy issued by Western Reserve. The plaintiff also named the injured players and coaches and the estates of the deceased players as defendants ("Injured Defendants"), the Injured Defendants subsequently filed a cross claim against the insurance companies.

Western Reserve filed a motion for summary judgment on the coverage issued on behalf

of itself and Lightning Rod. The Injured Defendants filed a cross motion for summary judgment, but only against Western Reserve. In its motion for summary judgment, Western Reserve contended that coverage was excluded because the bus, driven by Jerome Niemeyer was not an “auto” as that term was defined in the Western Reserve policy. Furthermore, coverage was excluded because the vehicle was being operated as a “public or livery conveyance.” The trial court found that the bus was not an “auto,” and therefore granted summary judgment in Western Reserve’s favor.

The Western Reserve policy contained the following exclusion:

### III. Exclusions

A. The coverages provided by this policy do not apply to:

\*\*\*

4. “Bodily injury”, “personal injury” or “property damage” arising out of or in connection with a “business” engaged in by an “insured”. This exclusion (A.4.) applies but is not limited to an act or omission, regardless of its nature or circumstances, involving a service or duty rendered, promised, owed, or

*implied to be provided because of the nature of the “business”.*

*However, this exclusion (A.4) does not apply to:*

\*\*\*

*e. The use of an “auto” for “business” purposes, other than an auto business, by an “insured”. However, we do not provide coverage for liability arising out of the ownership or operation of an “auto” while it is being used as a public or livery conveyance. This exclusion (A.4.e) does not apply to share-the-expense car pool\*\*\*.*

The Court of Appeals affirmed the trial court’s decision, finding that the exception to the business exclusion did not apply. In determining that the bus was not an “auto,” the court reasoned that automobile insurance regulations and vehicular laws in over 35 states, including Ohio, do not define a “private passenger motor vehicle” to include a chartered bus. The court also relied on *Bollinger v. Empire & Marine Ins. Co.*, 4th Dist. No. 1785, 1986 WL 14896, \*4.

The court also determined that the bus was being operated as a livery conveyance. In doing so, the court relied on the definitions of

“livery”, “charter”, and “conveyance” found in Black’s Law Dictionary (9th Ed. Rev. 2009), p. 1028.

### **Summary Judgment Affirmed for Insurer Where its Insured Settled a Suit Without its Knowledge or Consent**

In *Novak v. State Farm Insurance Companies*, 2009 Ohio 6952 (Ninth Appellate District), the Court of Appeals affirmed summary judgment on behalf of Defendant State Farm on a Supplemental Complaint. Novak owned a condominium that shared a common wall with a unit owed by the Fords. After the Fords abandoned their unit, a water pipe burst, which saturated the common wall between the two units and resulted in mold growth on the wall in Novak’s unit. The Condominium Association carried a policy with State Farm, which included as an insured each individual unit-owner.

The Fords consented to a judgment of \$100,000, which Novak agreed not to execute. Subsequently, Novak brought a Supplemental

Complaint against State Farm. The trial court granted State Farm's motion for summary judgment and held that the confession of judgment by the Fords prejudiced State Farm.

The Ninth District affirmed the trial court's entry of summary judgment. In its holding, the court held that the Fords breached the terms of their insurance agreement with State Farm and relieved it of any obligation to perform under the contract. The court further held that even if the Fords were unaware of the terms of the State Farm policy they would have become aware of their relationship with State Farm when confronted with the terms of their settlement as State Farm was the only entity that could be affected by their consent judgment.

***Suit Limitation Clause  
in Business Auto Policy  
Held Unenforceable  
Where the Insurer is  
Aware of the Injury  
and Fails to Inform the  
Insured of the  
Provision***

In *Wilson v. Ohio Casualty Insurance Co.* (December 24, 2009), 2009-Ohio-6798 (First

Appellate District), the Court of Appeals reversed the trial court's decision granting summary judgment for the insurer, holding that the insurer failed to inform the plaintiff of the policy's three-year limitations period for making a UM/UIM claim, therefore rendering the clause unenforceable. The insured was issued a business auto policy that contained UM/UIM coverage. On July 29, 2002, plaintiff was injured while driving his vehicle when he collided with another motorist. It was undisputed that Ohio Casualty was aware of the injury on August 12, 2002.

More than five years later, the insured made a UM-UIM claim for the July 29, 2002 injury. The insurer denied the claim, asserting that the three-year suit limitation clause barred coverage. The insured thereafter filed a complaint seeking a declaration that he was entitled to coverage. The trial court granted summary judgment for the insurer, finding that the limitation clause barred coverage. On appeal, the Court reversed the trial court's decision, holding that where an insurer has

been made aware that an insured has a potential claim under a policy involving UM/UIM coverage, the insurer must inform the insured of any applicable limitations period therein. The appellate court stated that "the duty may be fulfilled by providing the insured with a copy of the policy or by other means reasonably calculated to apprise the insured of his rights under the policy." The Court further held that it would be unconscionable to permit an insurance company to enforce a limitation clause against an insured who did not specifically bargain for the clause and who never had an opportunity to become aware of it until after the limitation period expired.

***Ohio Supreme Court  
Upholds Employer  
Intentional Tort Statute***

In *Kaminski v. Metal & Wire Prods. Co.*, 2010 Ohio 1027, the Ohio Supreme Court held that R.C. 2745.01 violates neither the plain language nor the plain meaning of Sections 34 or 35, Article II of the Ohio Constitution.

In *Kaminski*, an employee was injured at

work and brought suit against her employer under an intentional tort theory. The employee also claimed that 2745.01 was unconstitutional. The trial court granted the employer summary judgment. The Court of Appeals reversed, finding that 2745.01 was unconstitutional.

The Ohio Supreme Court reinstated the trial court decision, finding that 2745.01 is constitutional. Although the Court declined to overrule its decision in *Johnson v. BP Chems., Inc.* (1999), 85 Ohio St.3d 298, the Court did limit the holding in *Johnson* to the facts in that particular case.

In *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 2010 Ohio 1029, P1 (Ohio Mar. 23, 2010), decided on the same day as *Kaminski*, the Ohio Supreme Court held that 2745.01 is facially constitutional.

In *Stetter*, an employee was injured at work and brought suit against his employer under an intentional tort theory. Because there was diversity, the defendants removed the action to federal court. Thereafter, the defendants answered the plaintiff's complaint

claiming that the plaintiff could not establish that the defendants acted with deliberate intent. The plaintiff moved the court to strike the answer and/or declare 2745.01 unconstitutional.

The federal court certified eight questions inquiring about the constitutionality of 2745.01 to the Ohio Supreme Court. The court answered all questions in the negative, essentially finding that: (1) 2745.01 does not violate the Ohio Constitution's trial-by-jury provision, the right-to-a-remedy and open-courts provisions, the due-course-of-law provision, the equal protection provision, or the separation-of-powers doctrine and is therefore constitutional on its face; (2) 2745.01 does not conflict with the legislative authority granted to the General Assembly by Sections 34 and 35, Article II of the Ohio Constitution; and (3) 2745.01 does not eliminate the common-law cause of action for an employer intentional tort.